

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

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76-7081

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United States Court of Appeals
FOR THE SECOND CIRCUIT

CURTIS L. WARD,

Plaintiff-Appellant,

against

THE CITY OF NEW YORK, CONSOLIDATED EDISON OF NEW
YORK, INC., JAMES MARTIN, JOCAR CAB CORP., COSTELLO
CONSTRUCTION COMPANY, INC. and INTERBORO SURFACE
COMPANY,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK

**BRIEF OF DEFENDANT-APPELLEE CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CURTIS WARD,

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Plaintiff-Appellant,

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- against -

: DOCKET NO.
76-7081

THE CITY OF NEW YORK, CONSOLIDATED EDISON
OF NEW YORK, INC., JAMES MARTIN, JOCAR
CAB CORP., COSTELLO CONSTRUCTION COMPANY,
INC. and INTERBORO SURFACE COMPANY,

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Defendants-Appellees.

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BRIEF OF DEFENDANT-APPELLEE
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

PRELIMINARY STATEMENT

This is an appeal from a judgment dated January 30, 1976 adjudging that Curtis L. Ward have judgment against James Martin, Consolidated Edison Company of New York, Inc., Costello Construction Company, Inc., and Jocar Cab Corp., in the amount of \$750.00. The sole question raised by this appeal is the adequacy of the amount of the verdict.

FACTS

This is an action arising from an accident on February 27, 1974 on Seventh Avenue, between 31st and 32nd Streets in the Borough of Manhattan.

It is uncontrovered that while the plaintiff was in a taxi cab, owned by Jocar Cab Corp., and operated by James Martin, the cab struck vehicular plates owned by the Costello Construction Company, Inc., which were lying on the roadway of Seventh Avenue. The injuries of which Ward complains arise from this incident.

Costello Construction Company, Inc., was working in the roadway with the permission of The City of New York and pursuant to a contract with Con Edison.

The contract between Costello and Con Edison provided that the former ". . . shall indemnify and save harmless the Company (Con Edison) from and against any and all liability arising from injury to person occasioned wholly or in part by any act or omission of the contractor (Costello), his agents, servants or employees. . . ."

After the jury returned a verdict in favor of the plaintiff and against the defendants, Martin, Jocar, Con Edison and Costello, the trial court was requested to decide the cross-complaint of Con Edison against Costello as all parties had stipulated that this question should be decided by the court alone.

At this juncture, Costello, in open court, consented to indemnify Con Edison for all the damages occasioned by the accident.

QUESTION PRESENTED

Whether the verdict for the plaintiff in the amount of \$750.00 was so plainly out of measure as to be clearly erroneous.

POINT I

THE AWARD WAS NEITHER SO INADEQUATE OR ERRONEOUS AS TO REQUIRE A NEW TRIAL ON THE ISSUE OF DAMAGES

The appellant's primary contention is that since the special medical damages exceeded the verdict then the verdict is inadequate. The appellant's logic is flawed in one aspect: the

necessity of medical expenses and the reasonable-
ness of the cost are questions of fact for the jury.

This jury was not required to believe Curtis Ward when he alleged he paid a Dr. McKeever almost \$200.00 or that he even was treated by a Dr. Davis (A30, 33). These were questions of fact for the jury and the jury alone. The credibility of witnesses, the truthfulness and accuracy of the testimony whether contradictory or not is for the trier of the facts.

The authors of 25A C J S Damages § 176(6) state it in this manner:

"Generally issues relating to medical, hospital, and nursing expenses, such as the necessity and reasonable-
ness of such expenses, and whether they were connected with the injury caused by defendant, are for the determination of the jury."

Obediencia v. Liberty Mutual Ins. Co., 403 F. 2d 654 (6th Cir. 1968) is in accord with this reasoning. There the appellant complained that as a result of an auto accident he incurred special medical damages of \$1574.66. The jury awarded the appellant \$1044.90. The Court in rejecting the appellant's argument that the verdict was

inadequate stated:

"The nature, character and extent of the injuries of Appellants, as well as the reasonableness and necessity of their medical treatment and expenses, are jury questions. The medical testimony presented by both sides is extensive and, viewing this record as a whole, the awards to the respective plaintiffs are not such as to shock the judicial conscience and raise an irresistible inference that passion, prejudice, or other improper cause invaded the trial. Morgan v. Labiak, 368 F. 2d 338 (10 Cir. 1966); B. F. Goodrich Tire Co. v. Lyster, 328 F. 2d 411, 418 (5 Cir. 1964). This point is without merit."

See also: Lukmanis v. United States, 208 F. 2d 260 (2nd Cir. 1953).

Assuredly in the record before this Court there is nothing from which anyone could infer "that passion, prejudice, or other improper cause invaded the trial". Obediencia v. Liberty, supra, page 655. This Court is being asked to infer that the jury was prejudicial because the Appellant was a Vice-President of Montgomery Ward. To ascribe prejudice merely because of the economic disparity between the triers of the facts and the Appellant would be a declaration that all jurors must be in

economic harmony with the litigants. Such a conclusion would be ludicrous. The verdict of the Court below should be affirmed.

CONCLUSION

THE MERE FACT THAT WARD'S ALLEGED OUT OF POCKET EXPENSES EXCEEDED THE VERDICT BY A FEW HUNDRED DOLLARS SHOULD NOT BE GROUNDS FOR REVERSAL. THE NECESSITY OF MEDICAL TREATMENT AND THE REASONABLENESS OF ITS COST ARE QUESTIONS OF FACT FOR THE JURY

Respectfully submitted,

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Plaintiff-Appellant,
against

The City of New York, Consolidated Edison of New York, Inc.,

James Martin, Jocar Cab Corp., Costello Construction Company
Inc., and Interboro Surface Company,

**AFFIDAVIT
OF SERVICE
BY MAIL**

Defendants-Appellees.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Gustavo Ostor , being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 229 West 97th Street, New York, N.Y.
That on May 21, 1976 , he served 2 copies of Brief

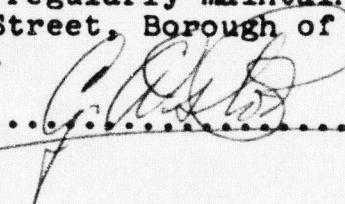
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by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
the United States Government at 350 Canal Street, Borough of Manhattan,
City of New York, addressed as above shown.

Sworn to before me this
21st day of May , 19 76

.....


John V. D'Esposito
JOHN V. D'ESPPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 20, 1977

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BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:
Helen D'Esposito

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 28 ridge Road, Albertson, New York
That on may 21, 1976 , he served 2 copies of Brief

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by depositing the same, properly enclosed in a securely-sealed,
post-paid wrapper, in a Branch Post Office regularly maintained by
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.....Helen D'Esposito.....

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